IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Philadelphia Indemnity Insurance Company, Plaintiff, vs. Community Foundation of the Ozarks, Inc., Defendant.	)))))))))	Cause No.

COMPLAINT FOR DECLARATORY RELIEF
JURY DEMANDED

Plaintiff Philadelphia Indemnity Insurance Company ("PIIC") for its Complaint for Declaratory Relief against Defendant Community Foundation of the Ozarks, Inc. ("CFO") states and alleges as follows:

THE PARTIES

1. Plaintiff PIIC is a Pennsylvania corporation with its principal place of business in Pennsylvania. PIIC is in the business of providing liability insurance.

2. Defendant CFO is a Missouri corporation with its principal place of business in Springfield, Missouri.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this dispute pursuant to 28 U.S.C. § 1332(a). PIIC and the defendant are citizens of different states and the amount in controversy exceeds $75,000.00 exclusive of interest and costs.

4. Venue is appropriate in this District by virtue of the provisions of 28 U.S.C. §1391. The lawsuit for which the defendants seek coverage from PIIC is pending in the Circuit Court of Greene County, and the underlying transactions at issue happened in this District.

5. Venue is appropriate in the Southern Division of the Western District of Missouri pursuant to W.D.Mo. L.R 3.1. Defendant CFO is located in this Division, and the underlying transactions at issue happened in this Division

JURY DEMAND

6. PIIC demands a jury trial of any factual issues pursuant to Rule 38 of the Federal Rules of Civil Procedure.

BACKGROUND

7. In April of 2013, Springfield Community Center, Inc. ("SCC") filed a lawsuit against Community Foundation of The Ozarks, Inc., venued in the Circuit Court of Greene County, Missouri (the "Underlying Action"). Springfield filed an Amended Petition in October of 2013. A true and correct copy of the Amended Petition is attached as **Exhibit A**.

8. According to the Amended Petition, SCC is a benevolent corporation that sponsors programs for minority children and Calvin Allen was the director of SCC.

9. It is alleged in the Amended Petition that on March 2, 2004, SCC issued a check in the amount of $500,000.00 to CFO. The check was then allegedly deposited in CFO's bank account.

10. It is alleged in the Underlying Action that CFO conspired with Ron Baird, a community leader and owner of a cement company ("Conco") to use Mr. Allen's $500,000.00 payment made by SCC to repay a "donation" made by Conco to CFO so that it could take advantage of tax credits offered by the State of Missouri.

11. According to the Amended Petition, on March 9, 2004, CFO at the request and for the benefit of Mr. Baird and Conco, made an intra-fund transfer within CFO's administered funds of the $500,000.00 to the Jordan Valley Park Fund. The Amended Petition goes on to allege that

the $500,000.00 payment made by SCC was used to fund a payment made by CFO to Conco as repayment of a portion of the $1,320,951.45 – "donation".

12. It is alleged that CFO had no contractual obligation to re-pay Conco.

13. The Amended Petition incorporates the following causes of action:

- Count I – Breach of Contract as to Defendant CFO;
- Count II – Conversion as to Defendant CFO;
- Count III – Fraud as to Defendant CFO;
- Count IV – Breach of Fiduciary Duty as to Defendant CFO;
- Count V – Unjust Enrichment as to Defendant CFO and Conco Companies;
- Count VI – Constructive Trust as to Defendants CFO, Baird and Conco Companies;
- Count VII – Civil Conspiracy as to Defendants CFO, Baird and Conco Companies; and
- Count VIII – Punitives as to Defendants CFO, Baird and Conco Companies.

14. In the Amended Petition, the following relief is sought:

- Counts I, II, III, IV and V – judgment against Defendant in the sum of $500,000.00 with interest, for prejudgment interest from date of demand to judgment, and for all further relief the Court deems just and proper;
- Count VI, VII – judgment against Defendants in the sum of $500,000.00 with interest, for prejudgment interest from date of demand to judgment, or in the alternative, for a constructive equitable trust as to said funds, and for all further relief the Court deems just and proper; and
- Count VIII – punitive damages, in addition to judgment against Defendant in the sum of $500,000.00 with interest, for prejudgment interest from date of demand to judgment, or in the alternative, for a constructive equitable trust as to said funds, and for all further relief the Court deems just and proper.

15. In support of the claim for Breach of Fiduciary Duty it is alleged that: "Defendant CFO breached its confidential and fiduciary relationship in transferring and using the funds for other than their intended purpose, in breaching Defendant's promise to Plaintiff of only disbursing the funds at the request, permission or authority of Plaintiff, with defendant failing to safeguard such funds."

16. In support of the Conspiracy claim, it is alleged that: "Defendants CFO, Baird and Conco Companies entered into an understanding and conspiracy to unlawfully and wrongfully deprive plaintiff of the $500,000.00 of Plaintiff's monies."

17. Through a letter dated January 30, 2012 to Mr. Fogle, the President of CFO, Mr. Allen demanded the return of the $500,000.00 plus accrued interest. A true and correct copy of the January 30, 2012 letter is attached as **Exhibit B**.

18. Through a letter dated February 27, 2013 from Douglas Nickell, counsel for the insured, wrote to Mr. Allen's counsel, Bruce McCurry, acknowledging Mr. Allen's demand for the return of the $500,000.00 plus accrued interest. A true and correct copy of the February 27, 2013 letter is attached as **Exhibit C**.

19. On April 9, 2013, Mr. Allen's counsel sent a letter referring to a "prior demand" and request for return of the $500,000.00. A true and correct copy of the April 9, 2013 letter is attached as **Exhibit D**.

20. The $500,000.00 was not returned. In the Underlying Action, SCC seeks the return of the $500,000.00 first demanded in January of 2012.

21. PIIC provided "claims made " management liability coverage to CFO through a FlexiPlus Five Not-For-Profit Organization Directors & Officers, Employment Practices Liability, Fiduciary Liability, Workplace Violence, and Internet Liability insurance policy.

22. Notice of SCC's "claim" was provided under policy number PHSD741333, in effect for the policy period July 1, 2012 to July 1, 2013. A true and correct copy of policy number PHSD741333 is attached as **Exhibit E**.

23. The policy was a renewal of policy number PHSD628321 in effect for the period of July 1, 2011 – July 1, 2012. A true and correct copy of policy number PHSD628321 is attached as **Exhibit F**.

24. During both policy periods, the D&O coverage was provided through form PI-NPD-2 (01/02).

25. The PIIC policies applied on a "claims made" basis. To fall within the insuring agreement to each of the PIIC policies, the claim must be first made against the insured during the policy period.

26. Through form number PI-NPD-2 (01/02), the FlexiPlus Five policy insuring agreement provides in relevant part:

> In consideration of the premium paid and in reliance upon all statements made and information furnished to the **Underwriter**, including all statements made in the **Application**, the **Underwriter** agrees to provide coverage as shown in the Declarations and described as follows:
>
> **PART 1**
> **Not-for-Profit Organization Directors & Officers Liability Insurance**
>
> (To be read in conjunction with the Common Policy Definitions, Exclusions and Conditions Sections, Part 6, 7, 8 below)
>
> I. INSURING AGREEMENTS
>
> A. The **Underwriter** will pay on behalf of the **Individual Insured**, **Loss** from **Claims** made against **Individual Insureds** during the **Policy Period** (or, if applicable, during the Extension Period), and reported to the **Underwriter** pursuant to the terms of this Policy, for **D&O Wrongful Acts**, except to the extent the **Organization** has indemnified the **Individual Insureds** for such **Loss**.

B. The **Underwriter** will pay on behalf of the **Organization**, **Loss** from **Claims** made against **Individual Insureds** during the **Policy Period** (or, if applicable, during the Extension Period), and reported to the **Underwriter** pursuant to the terms of this Policy, for **D&O Wrongful Acts**, if the **Organization** has indemnified such **Individual Insureds** for such **Loss**.

C. The **Underwriter** will pay on behalf of the **Organization**, **Loss** from **Claims** made against the **Organization** during the **Policy Period** (or, if applicable, during the Extension Period), and reported to the **Underwriter** pursuant to the terms of this **Policy**, for a **D&O Wrongful Act**.

27. To fall within the insuring agreement that applies to Part 1, the following requirements must be met:

- the "claim" must be brought against an "individual insured" or an entity qualifying as an "organization";
- the "claim" must be first made during the "policy period";
- the "claim" must result in a "loss";
- the "claim" must result from a "D&O wrongful act"; and
- the "claim" must be reported to PIIC as required by the policy.

28. Notice of SCC's "claim" was provided under policy number PHSD741333. The policy period is identified in the Declarations as July 1, 2012 to July 1, 2013. (Exh. A). Accordingly, to fall within the insuring agreement, the "claim" must have been made against the insured between July 1, 2012 and July 1, 2013.

29. The term "claim" is defined as follows:

B. **Claim** means for the purposes of Parts 1, 2, 3, and 5:

1. Any written demand for monetary or non-monetary relief; or

2. Any judicial, civil, administrative, regulatory, or arbitration proceeding (including any appeal there from), which subjects an **Insured** to a binding adjudication of liability for monetary or non-monetary relief for a **Wrongful Act**; or

3. Any written request to toll or waive any statute of limitations applicable to any actual or potential suit or cause of action against an **Insured.**

However, **Claim** shall not include a labor or grievance proceeding pursuant to a collective bargaining agreement.

30. Through the Pro-Pak Elite Enhancement – Missouri endorsement, form PI-NPD-82MO (12/05), the term "claim" was amended as follows:

A. Item B., **Claim**, will also mean any criminal proceeding commenced by the return of an indictment.

31. Through a letter dated January 30, 2012, prior to the effective date of policy number PHSD741333, Mr. Allen made a request that CFO "disburse all amounts from the fund, to include principal and interest." (Exh. B). The letter further demanded: "I request that a valid check in the amount of $500,000.00 plus the accrued interest be sent to me made payable to the Springfield Community Center." (Id.). This "demand" constitutes a "claim" as that term is defined by the PIIC policy. Accordingly, the "claim" was made against the insured on January 30, 2012.

32. To fall within the insuring agreement to PIIC policy number PHSD741333, the demand for monetary damages made by SCC must have been made against the insured during the policy period of July 1, 2012 to July 1, 2013. (Exh. A). SCC's demand for damages was made on January 30, 2012, six months before the effective date of the PIIC policy number PHSD741333. (Exh. B).

33. The PIIC policy also incorporates the following "Notice/Claim Reporting" condition:

IV. NOTICE/CLAIM REPORTING PROVISIONS

…

> A. In the event that a **Claim** is made against the **Insured**, the **Insured** shall, as a condition precedent to the obligations of the **Underwriter** under this Policy, give written notice to the **Underwriter** as soon as practicable after any of the directors, officers, governors, trustees, management committee members, or members of the Board of Members first become aware of such Claim, but, no later than 60 days after the expiration date of this **Policy**, **Extension Period**, or **Run-Off Policy**, if applicable.

(Exh. A).

34. Under the "Notice/Claim Reporting" condition, the insured must provide notice of the claim "as soon as practicable" after first becoming aware of such claim but, no later than 60 days after the expiration date of the policy.

35. The insured did not provide notice of SCC's claim to PIIC until April 2013, more than one year after the claim was first made against CFO and nine months after the policy in effect from July 1, 2011 to July 1, 2012 expired.

36. The term "D&O wrongful act" is defined as:

> A. **D&O Wrongful Act** means any actual or alleged:
>
> 1. Act, error, omission, misstatement, misleading statement, neglect, breach of duty or **Personal & Advertising Injury** committed or attempted by an **Individual Insured** in his/her capacity as an **Individual Insured**; or by the **Organization**; or
>
> 2. Act, error, omission, misstatement, and misleading statement, and neglect, breach of duty or **Personal & Advertising Injury** committed or attempted by an **Individual Insured** while serving as a director, officer, governor or trustee of any **Outside Entity**, if such service is at the written request or direction of the **Organization**.
>
> However, **D&O Wrongful Act** does not include an **Employment Practice Act, Fiduciary Liability Act**, or **Internet Liability Act**.

37. The alleged injury resulting from CFO's refusal to return SCC's funds was not the result of a "D&O wrongful act" as that term is defined in the policy.

38. The term "damages" is defined as:

> C. **Damages** means a monetary judgment, award or settlement, including punitive, exemplary or multiple portion thereof, or, with respect to Part 4 (Workplace Violence Insurance), **Violence Damage**.

39. Through the Pro-Pak Elite Enhancement – Missouri endorsement, form PI-NPD-82MO (12/05), the term "damage" was amended as follows:

> C. Solely with respect to Parts 1, 2, 3 and 5, Item C., and with respect to **Claims** brought outside Missouri, in a jurisdiction outside Missouri, **Damage** is replaced with following:
>
> > C. **Damage** means a monetary judgment, award or settlement including punitive or exemplary damages (including pre and post judgment, interest thereon) to the extent such punitive and exemplary damages are insurable under applicable law of any jurisdiction which has a substantial relationship to the **Insured** or to the **Claim** seeking such damage and which is most favorable to the insurability of such damage and then only on an amount not greater than the amount of compensatory damages awarded in such **Claim**.

40. The Amended Petition seeks an award of punitive damages. Punitive damages are not insurable under Missouri law. PIIC has no obligation to pay any punitive damages awarded against the insured.

41. As modified by endorsement, the term "defense cost" is defined as:

> D. **Defense Costs** means:
>
> > 1. Any reasonable and necessary legal fees and expenses incurred in the defense of a **Claim**, whether by the **Insured** with the **Underwriter's** consent or directly by the **Underwriter**, in the investigation, adjustment, defense and appeal of a **Claim**, except that **Defense Costs** shall not include:
> >
> > > a. Any amounts incurred in defense of any **Claim** for which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty; or

b. Salaries, wages, overhead or benefit expenses associated with any **Insured** except as specified in subparagraph 2 below; or

c. Salaries, wages, overhead or benefit expenses associated with employees of the **Underwriter**.

d. Pre-judgment interest and post-judgment interest on the portion of the judgment for which the **Underwriter** is liable under this policy, until the **Underwriter** has tendered or deposited in court or otherwise (sic) such judgment amount for which the **Underwriter** is liable.

2. A $250 per day per **Individual Insured** supplemental payment for the attendance at the request or with the consent of the **Underwriter** by such **Individual Insured** at hearings, trials or depositions. Such payment shall not exceed $5000 in the aggregate for all **Individual Insureds** in each **Claim**.

42. The FlexiPlus Five policy incorporates the following exclusion:

The **Underwriter** shall not be liable under this Part 1 to make any payment for **Loss** in connection with any **Claim** made against and **Insured**:
...

C. Arising out of, based upon or attributable to any actual or alleged breach of contract or agreement. However, this exclusion shall not apply to the following:

1. Liability of the **Insured** which would have attached even in the absence of such contract or agreement; or

2. **Defense Costs**.

43. Exclusion C. precludes coverage for the underlying claim.

44. Common Policy Exclusion A. provides:

The **Underwriter** shall not be liable to make any payment for **Loss** in connection with any **Claim** made against the **Insured**.

A. Arising out of, based upon or attributable to such **Insured** gaining any profit, remuneration or advantage to which they were not legally entitled; however, this exclusion shall only apply if a final and non-appealable judgment or adjudication establishes the **Insured** committed such act or omission;

45. Exclusion A. precludes coverage for "loss" in connection with any "claim" against the insured arising out of or based upon the insured's gaining any profit, remuneration or advantage to which it is not legally entitled.

46. Common policy exclusion B. provides:

> The **Underwriter** shall not be liable to make any payment for **Loss** in connection with any **Claim** made against the **Insured**.
>
> B. Arising out of, based upon or attributable to any dishonest or fraudulent act or omission or any criminal act or omission by such **Insured**; however, this exclusion shall only apply if a final and non-appealable judgment or adjudication establishes the **Insured** committed such act or omission. This exclusion shall not apply to a **Workplace Violence Act** under Part 4 (Workplace Violence Insurance);
>
> No **Wrongful Act** of any **Insured** shall be imputed to any **Individual Insured** for purpose of determining the applicability of Exclusions A. and B. above.

47. Under exclusion B., PIIC has no obligation to pay damages awarded against the insured for conversion or conspiracy.

COUNT – DECLARATORY RELIEF

48. PIIC realleges and incorporates by reference the allegations contain in paragraphs 1-47 of this Complaint.

49. There is a justiciable controversy between the Plaintiff and Defendant named in this Complaint as to whether the PIIC policies provides coverage for SCC's claim.

50. PIIC is entitled to a declaration that policy number PHSD741333, in effect for the policy period July 1, 2012 to July 1, 2013, does not provide coverage for SCC's claim because the claim was first made against CFO on January 30, 2012 – six months before the effective date of the policy.

51. PIIC is entitled to a declaration that policy number PHSD628321 in effect for the period of July 1, 2011 to July 1, 2012 does not provide coverage for SCC's claim because the claim was not reported to PIIC until April 2013 – more than nine months after the policy expired.

52. Alternatively, PIIC is entitled to a declaration that the alleged injury resulting from CFO's refusal to return SCC's funds was not the result of a "D&O wrongful act" as that term is defined in the PIIC policies.

53. PIIC is entitled to a declaration that it has no obligation to pay any punitive damages awarded against the insured.

54. Alternatively, PIIC is entitled to a declaration that exclusion C. in the PIIC policies precludes coverage for SCC's claim.

55. Alternatively, PIIC is entitled to a declaration that exclusion A. in the PIIC policies precludes coverage for SCC's claim.

56. Alternatively, PIIC is entitled to a declaration that exclusion B. in the PIIC policies precludes coverage for damages awarded against the insured for conversion or conspiracy.

REQUEST FOR RELIEF

WHEREFORE, PIIC requests that this Court find and issue an order declaring that:

a. PIIC policy number PHSD628321 in effect for the period of July 1, 2011 to July 1, 2012 does not provide coverage for SCC's claim;

b. PIIC policy number PHSD741333 in effect for the period of July 1, 2012 to July 1, 2013 does not provide coverage for SCC's claim; and

c. for such other and further relief as the Court deems just and appropriate.

HINSHAW & CULBERTSON LLP

By: /s/ Christopher M. Garcia
CHRISTOPHER M. GARCIA
Gateway One
701 Market Street, Suite 1300
St. Louis, MO 63101-1843
P: 314-241-2600
F: 314-241-7428
cgarcia@hinshawlaw.com